

**Testimony of Aaron Klein
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Introduction

Good afternoon, Chairman Akaka, Vice Chairman Barrasso, and members of the Committee. I appreciate the opportunity to testify before you on the Treasury Department’s Tribal Consultation program with a focus on our most recent consultation efforts to clarify and improve the application of the general welfare doctrine for Tribes for tax purposes.

Tribal Consultation

In 2000, President Clinton signed Executive Order 13175, which required all executive branch departments and agencies to engage in Tribal consultation on policies that have Tribal implications. EO 13175 also required each agency to establish a single Point of Contact for Tribal Consultation, a position I hold at the Treasury Department. In November 2009, President Obama issued a Memorandum to all agencies and departments requesting that agencies be actively engaged in Tribal consultation, that agencies review and consider revising their Tribal consultation policies, and that they consult with Tribal governments as they do so.

During those initial conversations with Treasury, Tribal leaders raised three key issues. First, they asked for a better process for improved Tribal consultation and an enhanced dialogue going forward. Specifically, they stressed the importance of Tribal sovereignty and that true consultation can only take place with the understanding that the relationship between Tribes and the Federal government is a government-to-government relationship. Second, Tribal leaders raised concerns about various tax code issues related to Tribal governments, Tribal corporations, and Tribal members. Among the many tax issues highlighted by Tribal leaders, concerns about the application of the general welfare doctrine were the most frequently raised. Finally, Tribes

raised a number of concerns regarding their access to capital for economic development. Within this area, issues relating to Tribal Economic Development Bonds as well as the Community Development Financial Institutions (CDFI) Fund's Native American program were the two most significant.

Treasury took the comments raised by Tribal leaders to heart. We have engaged in a series of meaningful actions in response to Tribal leaders' concerns, and I would like to update the Committee on our work.

Consultation Efforts

Treasury has taken a series of steps to enhance our Tribal consultation process. First, Treasury developed an internal Tribal consultation process as required by the Presidential Memorandum. This process is in accordance with EO 13175 and has three main principles:

- The Treasury Department is committed to the establishment of a comprehensive consultation process leading to meaningful dialogue with Indian Tribes on Treasury policies that have implications for such Tribes, and in particular those regulations and legislative proposals that have a direct and identifiable economic impact on Indian Tribes or preempt Tribal law.
- Tribal consultation will assist Treasury's development of policy, regulation, and legislative activities, as it will increase Treasury's understanding of the issues and potential impact of activities on Tribes and American Indians and Alaskan Natives.
- The Treasury Department is committed to developing and issuing regulations and guidance in a timely and efficient manner.

Tribal consultation must take place from an understanding that conversations between the Federal Government and Tribal governments are conducted on a government-to-government basis, which is predicated on mutual understanding and respect for Tribal sovereignty.

A strong consultation process requires open lines of communication in both directions. Tribal leaders need to be able to easily contact Treasury, whether to request a meeting, ask about a specific program, or submit their views on a particular issue. Treasury needs to be able to communicate with Tribal leaders in a clear, consistent, and transparent manner, and easily solicit Tribal views on policy issues. To accomplish these objectives, we have set up several institutional structures to improve our communication. First, we have created an email address for any Tribal leader to send a Tribal consultation request, Tribal.consult@Treasury.gov. Moreover, we have established a specific webpage dedicated to Tribal consultation which is regularly updated with the latest Tribal consultation requests, policy statements, and reports to Congress (<http://www.treasury.gov/resource-center/economic-policy/tribal-policy/Pages/Tribal-Policy.aspx>). We have also released our Tribal consultation plan so that any Tribe or interested party can see how Treasury is fulfilling our Tribal consultation requirement.

Since adopting our new Tribal consultation process, Treasury has engaged in multiple consultation processes over a wide variety of issues, including Tribal Economic Development Bonds and the application of the general welfare doctrine. In addition, we have continued to hold general consultation and listening sessions to solicit input from Tribal leaders as well as to enable Tribal leaders to ask detailed questions directly to Treasury officials.

Consultation can and must take place both in Washington, D.C. and in Indian country. I have engaged in consultation and listening sessions in South Dakota, Oregon, and Louisiana. Other Treasury officials have travelled across the country to conduct specific outreach efforts, including a series of conferences and events regarding access to capital, which were sponsored by the CDFI Fund along with the Federal Reserve Banks of Minneapolis and San Francisco and other federal agencies. My colleagues at the IRS have also regularly held consultation sessions across the country.

Tribal leaders often raise issues that concern both Treasury and IRS. To best address these concerns, we have regularly held joint consultation sessions where Tribal leaders engage with senior officials from both Treasury and IRS simultaneously. This not only maximizes efficiency

but also encourages a more collaborative process so that everyone is hearing and responding to all parties.

General Welfare Doctrine

During the course of our consultation efforts, Tribal leaders repeatedly raised concerns regarding whether certain payments or benefits provided by the Tribe to members are excludable from taxable income under the general welfare doctrine. This exclusion governs the types and kinds of benefits that Tribes can provide to their members without creating a taxable event. To be clear, it does not govern what benefits a Tribe can provide its members. Tribes are free to provide benefits on whatever basis they see fit, subject to other provisions of law. What this exclusion does govern is whether the provision of such a benefit constitutes taxable income on the part of the recipient.

Treasury and IRS listened to and considered the requests of Tribal leaders for increased clarity on the application of the general welfare doctrine. We agreed to begin a consultation process dedicated exclusively to this issue late last year, holding our first consultation meeting on November 30, 2011, in conjunction with the President's Tribal Nations summit. On March 8, 2012, we held another consultation session hosted by the National Congress of American Indians in conjunction with their annual conference. To provide an opportunity for direct dialogue for all Tribal leaders who were not able to make the earlier in-person consultation sessions, we also held a national phone call just two weeks ago on May 30, 2012. In all of these meetings, Treasury and IRS participated jointly, and while exact attendance figures are not known, it appears that approximately 300 people in total attended these events.

Our Tribal consultation on this issue was not limited to just these in-person meetings. The IRS issued Notice 2011-94 on November 15, 2011, which invited comments concerning the application of the general welfare exclusion to Indian Tribal government programs. When various Tribal leaders requested additional time to submit comments, we accommodated their requests by extending the deadline by an additional 30 days. I am pleased to report that we have

received over 65 comments from Tribes and Tribal leaders within the official comment period, and more than 20 additional comments since then.

Through our review of the written comments, our direct consultation efforts, and our own internal analysis, it is clear to us that additional guidance and clarity on the general welfare doctrine is warranted. Treasury and the IRS have now publicly committed to issue new written, published guidance on this subject. In doing so, we will remain mindful of the comments and positions thoughtfully articulated by Tribes and Tribal leaders during the consultation process.

Access to Capital

Access to capital is another critical concern raised repeatedly by Tribes and Tribal leaders. Treasury is actively engaged in helping Tribes access capital to grow their local economies. Within the CDFI Fund, a bureau of Treasury whose mission is to expand the capacity of financial institutions to provide credit, capital, and financial services to underserved populations and communities in the United States, the Native American CDFI Assistance Program (NACA) focuses exclusively on establishing and growing CDFIs in American Indian, Alaskan Native, and Native Hawaiian communities. I believe the NACA program represents one of the most successful programs in promoting access to capital in Indian Country. There are 70 certified Native American CDFIs in operation all around the country, hopefully serving many of the Tribes represented here today. As an economist, I like to measure the success of a program by demand. Certified Native CDFIs have grown by over 38% since 2009 and have increased five-fold since 2001, when there were just 14. Clearly there is demand among American Indians, Native Alaskans, and Native Hawaiians for CDFIs.

We are trying to keep pace with demand for Native American CDFIs. In March of this year, Treasury announced the results from our most recent round of funding for the NACA program. There were 71 applicants for over \$23 million in funds. This included 25 existing certified Native CDFIs that applied for more than \$16 million in grants along with 46 potential new Native CDFIs, certified Native CDFIs, and Sponsoring Entities that applied for over \$6 million

in technical assistance grants. Over the lifetime of the NACA program, Treasury and CDFI have awarded over \$57 million to more than 250 applicants.

Given its success, there is also strong support for the NACA program in Congress, and I would like to thank Chairman Akaka, members of the Indian Affairs Committee, especially Banking, Housing, and Urban Affairs Committee Chairman Johnson, and others for their continued strong support for the NACA program. This program is one of the most powerful and effective tools to promote economic development and bring basic financial services into Indian Country, and we are committed to working with Tribes and Tribal leaders to ensure its continued success.

Treasury has also worked with Tribes to help improve their access to the capital markets. As many of you are well aware, under current law Tribes have a more limited authority to issue tax-exempt municipal debt than states and localities. Many Tribes have argued against this policy on a variety of grounds, including that it has inhibited economic development, hampered Tribes' access to the capital markets, and was unfair when compared to the broad authority granted to State and local governments. The American Recovery and Reinvestment Act (Recovery Act) responded to these concerns by granting Treasury the authority to allocate \$2 billion of Tribal Economic Development Bonds (TEDBs) to Tribal governments. These allocations would grant Tribes the authority to issue tax-exempt debt for a wide range of projects that previously would not have qualified. Treasury acted quickly, allocating the funds in two different \$1 billion tranches and giving awards to 134 applicants.

Treasury was also given an opportunity in the Recovery Act to study the TEDB program and report back to Congress on both the program and, more broadly, on the issues surrounding Tribes' ability to issue tax-exempt debt. Our first step in this process was to act in accordance with Executive Order 13175 and begin a consultation process with Tribes. Through that process we received written comments from 27 Tribes, Tribal organizations, and interested parties from our open Notice in the Federal Register as well as many other comments and insights through various consultations. The input that we received through the consultation process proved invaluable as we sifted through the various policy options available. Broadly speaking, the

comments indicated the strong desire to grant Tribal governments permanent and indefinite authority to issue tax-exempt debt similar to the authority enjoyed by state governments.

Treasury submitted its congressional report on TEDBs in December 2011, in which we concluded:

“For reasons of tax parity, fairness, flexibility, and administrability, the Department recommends that Congress adopt the State or local government standard for tax-exempt government bonds... on a permanent basis for purposes of Indian Tribal government eligibility to issue tax-exempt governmental bonds, without a bond volume cap.”

That is we recommended that Congress make permanent the experiment begun in the Recovery Act and allow Tribal governments to have access to tax-exempt bonds on their own terms as consistent with the TEDB program. This conclusion is broadly consistent with the positions articulated by many Tribes and Tribal leaders.

While Treasury has made this recommendation for parity on tax-exempt debt, it will not become law until Congress acts. In the meantime, TEDB allocations from the original \$2 billion still exist and Treasury and the IRS are working to reallocate the existing authority. In that endeavor we have continued to seek Tribal input and hope to announce our plans for reallocation in the very near future.

Conclusion

Treasury remains committed to working with Tribes and Tribal leaders through our consultation process. In my view, our Tribal consultation on the general welfare doctrine is a perfect example of this process working at its best. Tribal leaders presented these issues to Treasury and IRS through general consultation and Treasury and IRS examined the issues and agreed to a more in-depth specific consultation, resulting in an extensive and highly productive dialogue. Consequently, the new guidance will improve the administrability and fairness of the tax code

while providing Tribes and Tribal members greater certainty for compliance. That concludes my testimony, and I look forward to answering any questions you may have.